In The

Supreme Court of the United States

October Term, 1976

No. 77-29[illegible]

ALAN NEMSER and SELMA W. NEMSER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioners, Alan Nemser and Selma W. Nemser, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made final in this proceeding on April 4, 1977.

OPINIONS BELOW

The opinion of the United States Tax Court rendered by Judge C. Moxley Featherston is reported at 66 T.C. 770 (1976) (see Appendix, 1a-7a). The oral decision of the Court of

Appeals, rendered on April 4, 1977, affirming the judgment of the Tax Court, is not yet reported. A copy of this decision is annexed hereto (see Appendix, 8a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 4, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is petitioner herein, who received a distribution of his share of the net assets of a trust in its terminal year, a "beneficiary succeeding to the property of the estate or trust" within the purview and meaning of the code section and the tax regulations, so as to entitle him to take as a deduction against his personal income, his pro rata share of the unused deductions in the terminal year of the trust?

2. Was the Court of Appeals for the Second Circuit justified in determining that petitioner, an assignee of a remainder interest in a testamentary trust, is not a "beneficiary succeeding to the property of the estate or trust", thereby rejecting *Blair v. Commissioner*, 300 U.S. 5 (1937) (see p. 5), in which the United States Supreme Court ruled that the assignee of a beneficial interest in a trust is a beneficiary and is entitled to the rights and remedies of a beneficiary?

STATUTES INVOLVED

This petition involved Section 642(h)(2) of the Internal Revenue Code of 1954, which states in relevant part as follows:

> "If on the termination of an estate or trust the estate or trust has . . . (2) for the last taxable year of the estate or trust, deductions (other than the deductions allowed under subsections (b) or (c) in excess of gross income for such year, then such. . .excess shall be allowed as a deduction, in accordance with regulations prescribed by the Secretary or his delegate, to the beneficiaries succeeding to the property of the estate or trust."

The term "beneficiary" is defined in the Tax Regulations, Section 1.642(h)(3) as follows:

> "Sec. 1.642(h)(3). Meaning of 'beneficiaries succeeding to the property of the estate or trust'. (a) The phrase 'beneficiaries succeeding to the property of the estate or trust' means those beneficiaries upon termination of the estate or trust who bear the burden of any loss."

STATEMENT

This matter was submitted to the Tax Court for determination on stipulated facts and briefs. No testimony was taken and there was no oral argument. The stipulation of facts (see Appendix, 9a-14a) establishes that:

I. Petitioner herein, on April 17, 1946, acquired by purchase from Richard Kadish, an assignee of Mary I. Llewellyn, a portion of a residuary interest in a trust established under the will of Silas J. Llewellyn, admitted to probate by the Probate Court of Cook County, Illinois, in the year 1925. By the terms of the will, said residuary interest was payable to Mary I. Llewellyn, a granddaughter of the testator, upon the death of Gertrude Stone, her aunt, without issue (Stipulation of facts; items 4,5,6,7,8,9) (Appendix, 10a-11a).

II. On June 22, 1956, after the death of Gertrude Stone, the

trustee of said trust filed its amended complaint in the Superior Court, Cook County, Illinois, naming the petitioner herein as one of the defendants, and asking for instructions concerning the distribution of that portion of the trust which was distributable upon the death of Gertrude Stone, and asking the Court to pass upon the validity of assignments of her remainder interest therein theretofore made by Mary I. Llewellyn (Stipulation of facts; items 11,12) (Appendix, 11a).

III. The litigation thus instituted on June 22, 1956, was ultimately resolved by the June 6, 1966 decision of the Appellate Court of Illinois, holding that the assignments were valid and that Alan Nemser, the petitioner herein, was entitled to receive distribution of his specified pro rata share of the assets of the trust. Acting under the mandate of that decision, on December 21, 1967, the Circuit Court of Cook County, Illinois, entered its decree, particularizing the contents of the trust and establishing the value thereof as of that date at $725,046.29 (prior to deducting the trustee's fees, the attorneys' fees and other trust expenses as allowed by the court for the final year of the trust) and determining that petitioner's interest in said trust was 10.7142% thereof ($77,682.99) (Stipulation of facts; items 13,14,15) (Appendix, 11a).

IV. On actual distribution to petitioner in the year 1968, the terminal year of the trust, petitioner received as his share of the trust, securities having a fair market value of $55,788.16 (Stipulation of facts; item 18) (Appendix, 13a).

V. Unused deductible expenses in the trust in its terminal year of 1968, that is to say, deductible expenses in excess of income, were $134,346.15 and petitioner's 10.7142% share thereof was $14,394.12, the amount claimed by petitioner in his personal income tax return for the year 1968 (Stipulation of facts; items 20, 21) (Appendix, 13a).

VI. The amount potentially available for distribution to

petitioner out of said trust fund, as described, listed and identified by the Illinois Court in its decree of December 21, 1967, was reduced by said sum of $14,394.12 (Stipulation of facts; item 21) (Appendix, 13a).

Taxpayers petitioned the United States Tax Court to review and set aside a deficiency determination of $6,782.32 made by the Commissioner of Internal Revenue with respect to petitioner's 1968 federal income tax return and based upon disallowance by the Commissioner of deductions made pursuant to Section 642(h)(2) of the Internal Revenue Code, *infra* at 3.

The Commissioner argued in support of the disallowance of this deduction, that petitioner was not a "beneficiary" because he did not receive his share of the trust by virtue of a bequest, devise or inheritance under State succession laws. Petitioner sought to convince the Tax Court that the term "beneficiary succeeding to the property of the estate or trust" should not be limited in this manner, and that the congressional intention was to confer this benefit on any person "succeeding to the property," including an assignee of a beneficial interest in the property.

Petitioner was unaware, at the time that briefs were submitted to the Tax Court, that the United States Supreme Court had addressed itself to this issue in the case of *Blair v. Commissioner*, 300 U.S. 5 (1937). In that case, this Court considered the tax consequences of the assignment by the petitioner of income from a trust, concluding:

> ". . . If under the law governing the trust the beneficial interest is assignable, and if it has been assigned without reservation, the assignee thus becomes the beneficiary and is entitled to rights and remedies accordingly." 300 U.S. 5 at p. 12.

The Tax Court rendered its decision against petitioner without reference to *Blair*.

The *Blair* case came to petitioner's attention several days prior to argument before the Second Circuit. Petitioner presented the *Blair* definition of "beneficiary" during that oral argument. Nevertheless, the court rendered its decision from the bench, refusing to apply *Blair* and stating that the case "comes down simply to a question of statutory interpretation." (Appendix, 9a). No attempt was made to distinguish *Blair*.

REASONS FOR GRANTING THE WRIT

The writ should be granted to resolve the conflict between the decision of the Second Circuit Court of Appeals and that of the United States Supreme Court in *Blair v. Commissioner*, 300 U.S. 5 (1937), thereby promoting the proper interpretation and uniform application of the Internal Revenue Code.

Blair involved the assignment by the petitioner of income from a trust. In determining that the income was taxable to the assignee, this Court concluded that "If under the law governing the trust the beneficial interest is assignable, and if it has been assigned without reservation, the assignee thus becomes the beneficiary and is entitled to rights and remedies accordingly." 300 U.S. 5, at p. 12.

The Court of Appeals for the Second Circuit, by affirming the decision of the Tax Court, has directly rejected this determination, holding that petitioner herein, the assignee of an interest in a trust, is not a beneficiary and is not entitled to the rights and remedies provided in the Internal Revenue Code Section 642(h)(2). No attempt was made to justify this decision in the light of *Blair* or to explain the rejection of the United States Supreme Court's definition of beneficiary contained therein.

If the decision of the Circuit Court of Appeals is allowed to stand, petitioner and other taxpayers will be subjected to inconsistent applications of the existing tax law. One definition

is applied for the purpose of imposing tax, and an entirely different definition is imposed for the purpose of determining the taxpayer's rights and remedies. This inequitable result is achieved despite the clear and unqualified statement by this Court in *Blair* that an assignee of a beneficial interest in a trust is entitled to all rights and remedies afforded to a beneficiary.

CONCLUSION

For these reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

s/ Alan Nemser
Attorney Pro Se
for Petitioners

APPENDIX

OPINION OF THE TAX COURT

66 T. C. No. 71

UNITED STATES TAX COURT

ALAN NEMSER and SELMA W. NEMSER, Petitioners *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 481-74 Filed July 27, 1976.

Held, the phrase "beneficiaries succeeding to the property of the estate or trust," as used in sec. 642(h), I.R.C. 1954, does not include a purchaser of an interest in a testamentary trust.

Alan Nemser, pro se.

Theodore M. David, for the respondent.

OPINION

FEATHERSTON, *Judge:* Respondent determined a deficiency of $6,782.32 in petitioners' 1968 Federal income tax. The parties have stipulated that the issue for decision is whether petitioner Alan Nemser is a beneficiary succeeding to the property of a trust within the meaning of section 642(h)(2)[1] so as to entitle him to take as a deduction against his personal income his pro rata share of the unused deductions in the terminal year of the trust.

The facts are all stipulated.

Petitioners Alan Nemser and Selma W. Nemser were legal

1. All section references are to the Internal Revenue Code of 1954, as in effect during the tax year in issue, unless otherwise noted.

residents of Merrick, New York, at the time their petition herein was filed. They timely filed their joint Federal income tax return for 1968 with the District Director of Internal Revenue, Manhattan, New York.

During 1968 petitioner Alan Nemser (hereinafter petitioner) was a practicing, self-employed attorney. The present controversy stems from his purchase of an interest in a testamentary trust created by Silas J. Llewellyn, who died a resident of Illinois on September 3, 1925.

Under the terms of the trust created by the will of Silas J. Llewellyn, Mary Isabelle Llewellyn, a granddaughter of the testator, received a remainder interest. The extent of her interest was contingent upon her father's (Paul Llewellyn's) dying without surviving issue other than herself, and her aunt's (Gertrude Stone's) dying without issue.

On March 29, 1946, Mary Isabelle Llewellyn sold, assigned, and transferred to the Fidelity Philadelphia Trust Company, as nominee for Richard Kadish, Irving Poretz, and Aaron Miller (hereinafter the Richard Kadish group), all of her interest in a fractional portion of her interest in the Gertrude Stone portion of the trust. The consideration for the transfer was $31,500, of which $14,000 was paid by Richard Kadish, $14,000 by Irving Poretz, and $3,500 by Aaron Miller. On April 11, 1946, the Fidelity Philadelphia Trust Company acknowledged that it held the assigned portion of the trust in its name for their benefit, in the following proportions:

Richard Kadish	4/9
Irving Poretz	4/9
Aaron Miller	1/9

Neither petitioner nor any one of the Richard Kadish group was named as a beneficiary in the will of Silas J. Llewellyn.

On April 17, 1946, Richard Kadish sold and transferred to petitioner 3/14 of his 4/9 interest in Silas J. Llewellyn's trust estate for the sum of $3,000. Petitioner's purchase of the 3/14 interest in the Kadish 4/9 interest was made for investment purposes.

In 1956 both Paul Llewellyn and Gertrude Stone died. He left no issue other than Mary Isabelle Llewellyn, and Gertrude Stone died without issue. Shortly after their deaths the City National Bank and Trust Company, trustee under the will of Silas J. Llewellyn, filed an action in the Superior Court, Cook County, Illinois, asking for instructions concerning the disposition of that portion of the estate which was distributable upon the death of Gertrude Stone. The court was also requested to pass upon the validity of the assignments made by Mary Isabelle Llewellyn of portions of her remainder interest. Petitioner was named as one of the defendants and was described as a person claiming distribution as an assignee of Richard Kadish.

The Appellate Court of the State of Illinois rendered its decision on June 6, 1966, holding that the March 29, 1946, assignment by Mary Isabelle Llewellyn to the Richard Kadish group was valid and enforceable and that, pursuant to the assignment, petitioner, as an assignee of Richard Kadish, was entitled to distribution of his pro rata portion of the trust estate's assets. The fund available for distribution to the Richard Kadish group and their assignees was $725,046.29. During 1968 the Richard Kadish group's share was distributed to the individuals named in the court decree, after first deducting trustee's fees, attorneys' fees, and expenses as allowed by the court for the final year of the trust. Petitioner received as his share stocks having a fair market value of $55,788.16.

The trustee reported that for 1968, the year of the termination of the trust, deductible expenses exceeded income

by $134,346.15 for the Richard Kadish group's portion of the trust estate. Of this excess amount petitioner claimed $14,394.12 as a deduction on his 1968 joint Federal income tax return, representing his 10.7142-percent share of the Richard Kadish group's portion of the trust estate. Respondent disallowed the deduction on the ground that petitioner was not a beneficiary of the trust within the meaning of section 642(h)(2).[2]

Petitioner maintains that the term "beneficiaries," as used in section 642(h)(2), should be construed broadly so as to include any person to whom property is distributed from an estate or trust, whether or not that person was designated as a beneficiary under the terms of the testator's will. In support of his position, petitioner relies on section 1.642(h)-3(a), Income Tax Regs., which provides:

> "The phrase 'beneficiaries succeeding to the property of the estate or trust' means those beneficiaries upon termination of the estate or trust who bear the burden of any loss for which a carryover is allowed, or of any excess of deductions over gross income for which a deduction is allowed, under section 642(h)."

2. SEC. 642. SPECIAL RULES FOR CREDITS AND DEDUCTIONS.

> (h) Unused Loss Carryovers and Excess Deductions on Termination Available to Beneficiaries.—If on the termination of an estate or trust, the estate or trust has—
>
> * * *
>
> (2) for the last taxable year of the estate or trust deductions (other than the deductions allowed under subsections (b) or (c)) in excess of gross income for such year, then such carryover or such excess shall be allowed as a deduction, in accordance with regulations prescribed by the Secretary or his delegate, to the beneficiaries succeeding to the property of the estate or trust.

Petitioner argues that the regulation establishes that if, in the year of termination of a trust, the expenses of the trust exceed the trust's income, section 642(h)(2) allows the excess expenses as deductions to any distributee whose share is diminished by those expenses. We disagree.

The regulation relied upon by petitioner provides no real help in ascertaining the meaning of the term "beneficiaries," as used in section 642(h)(2). In reality this definition begs the question we must decide. It defines "beneficiaries succeeding to the property of the estate or trust" as those beneficiaries who bear the burden of any loss or any excess of deductions over gross income. It does not give any clue as to whether purchasers of interests in an estate or trust are beneficiaries within the meaning of section 642(h)(2).

Section 642(h) was enacted by Congress to allow beneficiaries succeeding to the property of an estate or trust to deduct in the terminal year of the estate or trust unused loss carryovers and expenses in excess of the estate's or trust's income; otherwise, those deductions would be forever lost. H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess. 62, A201 (1954); S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess. 83, 343 (1954); see *Charles F. Neave*, 17 T.C. 1237, 1240-1243 (1952), for a discussion of the prior law. The use of the phrase "beneficiaries *succeeding* to the property" (emphasis added) indicates that the section was intended to refer only to recipients of property by bequest, devise, or inheritance under State succession laws. The amount of the property so received by will or inheritance under State law is not includable in gross income

by virtue of section 102[3] but is reduced by losses and expenses incurred by the estate. Thus, without section 642(h)(2), the distribution to the beneficiaries succeeding to the property would be decreased, but they would receive no deduction for the amount of such decrease.

By entering the transaction with Mary Isabelle Llewellyn, however, the Richard Kadish group acquired nothing by bequest, devise, or inheritance. Whatever that group acquired was by purchase, and what they purchased was a fractional portion of the trust principal remaining after the losses and administration expenses of the trust had been taken into account. They acquired no income rights. It is stipulated that Mary Isabelle Llewellyn "sold, assigned and transferred" to the nominee of the Richard Kadish group (of which petitioner was an assignee) "her right, title and interest in and to 3/4 of the

3. SEC. 102. GIFTS AND INHERITANCES.

(a) General Rule.—Gross income does not include the value of property acquired by gift, devise, or inheritance.

(b) Income.—Subsection (a) shall not exclude from gross income—

(1) the income from any property referred to in subsection (a); or

(2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

Where, under the terms of the gift, bequest, devise, or inheritance, the payment, crediting, or distribution thereof is to be made at intervals, then, to the extent that it is paid or credited or to be distributed out of income from property, it shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property. Any amount included in the gross income of a beneficiary under subchapter J shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property.

share, right, title and interest in and to the *corpus* of the estate of Silas J. Llewellyn, *which would become payable to her* in the event that her aunt, Gertrude Stone, should die without issue surviving." (Emphasis added.) None of the corpus of the trust would "become payable" to Mary Isabelle Llewellyn until after the expenses of its administration and liquidation had been paid. Petitioner, therefore, did not bear the burden of any of those expenses. As a purchaser of a portion of the trust estate remaining after the expenses were paid, he was in no sense a beneficiary succeeding to the property of the trust.

In *Greggar P. Sletteland,* 43 T.C. 602 (1965), this Court rejected the notion that the term "beneficiaries," as used in section 642(h), includes purchasers of interests in estates or trusts. In that case a taxpayer acquired an interest in an estate in consideration of legal services rendered to a client. This Court concluded (pp. 609-610) that the taxpayer "acquired the claims property, not in the capacity of a beneficiary of an estate, but rather as an attorney for services rendered to a client" and was not entitled to a deduction for the estate's expenses over gross income in the estate's terminal year. We also said at 610:

> "* * * it seems evident that the underlying purpose of section 642(h) was to afford some measure of relief to heirs and those designated as takers under a decedent's will, who take diminished interests in a decedent's property as the result of the incurrence of expenses and losses by the estate. * * *"

We adhere to the *Sletteland* opinion.

To reflect the foregoing,

Decision will be entered for the respondent.

OPINION OF THE UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

ALAN NEMSER and SELMA NEMSER,

Petitioner-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Docket 76-4231

Before: HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge.*

JACOB MISHLER*, and MILTON POLLACK**, *District Judges.*

New York, New York

April 4, 1977

Statement made by the court at disposition of appeal in open court.

JUDGE VAN GRAAFEILAND:

Counsel — we've read the briefs and the record and have

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* Chief Judge of the Eastern District of New York.

** District Judge of the Southern District of New York; sitting by designation.

examined *Blair v. Commissioner,* 300 U.S. 5 (1937); and it comes down simply to a question of statutory interpretation. We agree with the Tax Court that appellant Alan Nemser does not qualify as a "beneficiary succeeding to the property of the estate or trust" within the meaning of §642(h)(2) of the Internal Revenue Code, and we *affirm* the decision of the Tax Court which so holds.

STIPULATION OF FACTS

UNITED STATES TAX COURT

ALAN NEMSER and SELMA W. NEMSER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 481-74

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true. The parties further agree to submit this case as fully stipulated under Rule 122 of the Tax Court's Rules of Practice.

1. At the time of filing the petition herein the petitioners resided at 2833 Harbor Road, Merrick, New York.

2. Petitioners filed a timely Joint United States Individual Income Tax Return for taxable year 1968 with the District

Stipulation of Facts

Director at Manhattan, New York, a copy of which is attached hereto and marked Exhibit 1-A.

3. During taxable year 1968 petitioner was self-employed as an attorney.

4. Silas J. Llewellyn died a resident of the State of Illinois on September 3, 1925, and his will, a transcription of which is attached hereto and marked Exhibit 2-B, was admitted to probate shortly thereafter by the Probate Court of Cook County.

5. On March 29, 1946, Mary Isabelle Llewellyn, the daughter and only child of Silas J. Llewellyn's son, Paul, sold, assigned and transferred to the Fidelity Philadelphia Trust Company, as nominee for Richard Kadish, Irving Poretz and Aaron Miller, all of her right, title and interest in and to 3/4 of the share, right, title and interest in and to the corpus of the estate of Silas J. Llewellyn, which would become payable to her in the event that her aunt, Gertrude Stone, should die without issue surviving. The interest thus assigned is otherwise expressed as 3/4 of 1/2 of 1/3 of the total Silas J. Llewellyn estate.

6. The consideration for the transfer described in 5, above, was $31,500.00, of which $14,000.00 was paid by Richard Kadish, $14,000.00 by Irving Poretz and $3,500.00 by Aaron Miller, and the Fidelity Philadelphia Trust Company acknowledged on April 11, 1946, that it held said assignment in its name for their benefit, in the following proportions:

Richard Kadish	4/9
Irving Poretz	4/9
Aaron Miller	1/9

7. Neither the petitioner nor Richard Kadish, Irving Poretz or Aaron Miller were named as beneficiaries in the will of Silas J. Llewellyn.

Stipulation of Facts

8. On April 17, 1946, Richard Kadish sold, assigned and transferred to petitioner herein, Alan Nemser, 3/14ths of his said 4/9th interest, for and in consideration of the payment to Richard Kadish of the sum of $3,000.00.

9. The petitioner's purchase of the 3/14ths interest in the Kadish 4/9th interest was made for investment purposes.

10. Paul Llewellyn, son of Silas J. Llewellyn, died on January 10, 1956, survived by his only child, Mary Isabelle Llewellyn. Gertrude Stone, daughter of Silas J. Llewellyn, died on April 14, 1956, leaving no issue.

11. On June 22, 1956 the City National Bank and Trust Company, Trustee under the Will of Silas J. Llewellyn, deceased, (subsequently known as Continental Illinois National Bank and Trust Company of Chicago) filed its amended complaint in the Superior Court, Cook County, Illinois, asking for instructions concerning the distribution of that portion of the estate which was distributable upon the death of Gertrude Stone and asking the Court to pass upon the validity of assignments of her remainder interest therein theretofore made by Mary Isabelle Llewellyn.

12. Petitioner herein, Alan Nemser, was named as a defendant and served with process in the said suit brought by the Trustee and was described therein as a person claiming distribution as an assignee of Richard Kadish, one of the original purchasers of the interest purchased on March 29, 1946.

13. On June 6, 1966, the Appellate Court of the State of Illinois rendered its decision in which it was determined that the March 29, 1946 assignment by Mary Isabelle Llewellyn was valid and enforceable and that, pursuant to said assignment, petitioner herein, Alan Nemser, as an assignee, was entitled to distribution of his pro rata portion of the assets.

Stipulation of Facts

14. A copy of the opinion of the Appellate Court of the State of Illinois in regard to the Llewellyn trust and the assignment made by Mary Isabelle Llewellyn is attached hereto and marked Exhibit 3-C.

15. On December 21, 1967, acting under the mandate of said Appellate Court decision, the Circuit Court of Cook County entered its Decree, which directed, among other things,

> Decree, Par. 16. "For purposes of making a segregation, allocation and distribution in cash and in kind under this decree, plaintiff shall create the following distribution shares:
>
> | | |
> |---|---|
> | Richard Kadish, et al. | 66 and 2/3% of Mary I. Llewellyn-Stone fund |

Decree Par. 17. "The interests in the Richard Kadish, et al. Distribution share are as follows:"

Richard Kadish	19.6429%
Max Kadish	19.6429%
Alan Nemser	10.7142%
Florence Poretz, individually and as attorney in fact for Carol R. Poretz and Stephanie Poretz	25.0000%
Elliott L. Krause, as trustee for the benefit of Creditors of Metropolitan Machine Shops, Inc., bankrupt	25.0000%
	100.0000%

Stipulation of Facts

A copy of the decree is attached hereto and marked Exhibit 4-D.

16. The fund available for distribution to the above-named persons entitled to distribution of the Richard Kadish, et al share was, as listed and stated in the Decree, $725,046.29.

17. In the year 1968, the Richard Kadish, et al share was distributed to the above-named persons, after first deducting trustees fees, attorneys fees and expenses as allowed by the Court for the final year of the trust.

18. The petitioner received, as a distribution from the trust upon termination, stocks having a fair market value of $55,788.16.

19. The trustee reported that, according to its accounts, with respect to the funds held by it for distribution to the persons entitled to distribution in the Kadish, et al share, the amount of deductible expenses in excess of income for the year 1968, the terminal year of the trust, was $134,346.15.

20. The share of such excess claimed by the petitioner, Alan Nemser, was 10.7142 per cent of $134,346.15, namely, $14,394.12.

21. The amount potentially available for distribution to petitioner, Alan Nemser, out of said Richard Kadish, et al fund, as described, listed and identified by the Illinois Court in its Decree of December 21, 1967 was reduced by said sum of $14,394.12.

IT IS FURTHER STIPULATED AND AGREED that, upon the foregoing statement of facts, the issue to be presented to the Court herein will be whether petitioner is a "beneficiary succeeding to the property of the estate or trust" within the purview and meaning of *Int. Rev. Code of 1954*, §642(h)(2), so

as to entitle him to take as a deduction against his personal income his pro rata share of the unused deductions in the terminal year of the trust.

MEADE WHITAKER
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s/Alan Nemser
ALAN NEMSER

s/ Selma W. Nemser
by Alan Nemser
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Merrick, New York

No. 77-29

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALAN NEMSER AND SELMA W. NEMSER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-29

ALAN NEMSER AND SELMA W. NEMSER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal income tax case is whether petitioners were correctly denied a deduction under Section 642(h)(2) of the Internal Revenue Code of 1954 (26 U.S.C.), which provides that, upon the termination of an estate or trust which has deductions in excess of its gross income for its last taxable year, such excess deductions shall be allowed to "the beneficiaries succeeding to the property of the estate or trust."

Petitioner[1] purchased a fractional part of a remainder interest in a testamentary trust. Upon termination of the trust in 1968, certain securities were distributed to him as his

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[1]"Petitioner" refers to Alan Nemser. Selma W. Nemser is a party solely because she filed a joint return with her husband for the year at issue.

share of the trust's assets (Pet. App. 3a, 11a, 13a). For 1968, the trust's deductible expenses exceeded its income, and petitioner reported a deduction of $14,394.12 under Section 642(h)(2), equal to his claimed share of the excess deductions of the trust (Pet. App. 3a-4a, 13a). The Tax Court upheld the Commissioner's determination that petitioner was not entitled to a deduction under Section 642(h) because, as a purchaser of his interest in the trust, he was not a "beneficiary succeeding to the property of the trust" within the meaning of Section 642(h)(2) (Pet. App. 1a-7a). The court of appeals affirmed (Pet. App. 8a-9a).

The courts below correctly held that petitioner was not entitled to a deduction under Section 642(h) for the excess deductions of the trust in which he purchased an interest. In the only other reported decision under Section 642(h), the Tax Court likewise held that a lawyer to whom estate property had been assigned as compensation for legal services did not qualify as a "beneficiary succeeding to the property of the estate" for purposes of qualifying for the excess deduction pass-through provided by Section 642(h)(2). *Sletteland* v. *Commissioner*, 43 T.C. 602. There, the Tax Court ruled that Section 642(h) was inapplicable to persons who, like petitioner, acquire an interest in an estate or trust for a valuable consideration, and not as a beneficiary of the decedent or settlor.

As the Tax Court stated in this case (Pet. App. 5a), Section 642(h) was added to the 1954 Code to permit beneficiaries succeeding to the property of an estate or trust to deduct incurred excess losses upon termination of the estate or trust. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. 62 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 83, 343 (1954). The use of the phrase "beneficiaries succeeding to the property" in Section 642(h)(2) indicates that the provision encompasses only recipients of property

by bequest or gift. As the court explained in *Renton Inv. Co.* v. *Commissioner*, 131 F. 2d 330, 335 (C.A. 9), "[A beneficiary is] one who receives anything as a gift; one who receives a benefit or advantage; the recipient of another's bounty * * *."

Here, however, petitioner is not a "beneficiary succeeding to the property" within the meaning of the statute. To the contrary, he was a purchaser for value. Petitioner's basis in the property purchased would therefore be determined under Section 1012 by reference to the cost of the property, and not under the special provisions applicable when property is acquired from a decedent (Sections 1014 and 1023), or is acquired by a gift or transfer in trust (Section 1015). Excluding the purchaser of an interest in a trust from the benefits of Section 642(h) is entirely consistent with the different tax treatment accorded purchasers of trust interests and those who receive such interests by gift or devise.

Contrary to petitioner's argument, the decision below does not conflict with *Blair* v. *Commissioner*, 300 U.S. 5. In *Blair*, the issue was whether the donor of certain income interests in a trust was liable for income tax on the income distributions, despite the assignments of those income interests to his children. In holding the donor was not liable, this Court applied the general principles relating to assignment of income, noting that under the revenue acts "tax liability attaches to ownership" (*id.* at 12).

Here, unlike *Blair*, there is no question concerning the proper taxpayer for purposes of trust income distributions. The dispositive point here is that a purchaser of a trust interest is not taxed as a beneficiary, but, instead, is taxed as an investor on any gain realized from the transaction. Accordingly, the Court's statement in *Blair* that the assignee of the beneficial interest "becomes the beneficiary"

(*ibid.*) cannot be read to address the wholly different question here involving the scope of Section 642(h), which was enacted long after the decision in that case.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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